SUMMARY OF MINUTES

The Committee on Revision of the Penal Code met at The University of Texas School of Law on Friday, June 16, 1967, at 10 a.m.

The committee considered Dean Keeton's proposed draft on rape, and the following drafts were approved:

Section 101. Rape.

1. A male who has sexual intercourse with a female not his wife, without that person's consent, commits rape. The intercourse is without the female's consent under any of the following circumstances:

(a) he compels her to submit or participate by force that overcomes such earnest resistance as might be reasonably expected under the circumstances, or

(b) he compels her to submit or participate by any threat that would prevent resistance by a woman of ordinary resolution, or

(c) she has not given express or implied consent and he knows she is unconscious or physically unable to resist, or

(d) he knows that as a result of mental disease or defect she is at the time of the sexual intercourse incapable of appraising the nature of her conduct, or

(e) he knows she is unaware that a sexual act is being committed, or

(f) he knows that she submits or participates because she erroneously believes that he is her husband, or

(g) he has impaired her power to appraise or control her conduct by administering without her knowledge drugs, alcohol, or similar substance with intent of preventing resistance.

2. Rape is a felony of the second degree.

Section 102. Aggravated Rape.

1. A male who has sexual intercourse with a female not his wife, without that person's consent as defined in Section 101, commits aggravated rape if:

(a) he causes serious bodily injury to anyone in the course thereof; or

(b) he compels submission by express or implied threat of death, serious bodily injury, extreme pain, or kidnapping to be imminently inflicted on anyone.

2. Aggravated rape is a felony of the first degree.

The committee next considered Fred Cohen's report on sentencing, and approved the following drafts:

Section 1.04. Classes of Crimes.

(1) Crimes are classified as felonies, gross misdemeanors, simple misdemeanors, or petty misdemeanors.

(2) A crime is a felony if it is so designated by law or if persons convicted thereof may be sentenced to death or to the custody of the Texas Department of Corrections.

(3) Felonies are classified according to the relative seriousness of the crime, for the purpose of sentence, into four degrees, as follows:

(a) felonies of the first degree;

(b) felonies of the second degree;

(c) felonies of the third degree; and

(d) felonies of the fourth degree.

A crime declared to be a felony without specification of degree is of the fourth degree.

(4) A crime is a gross misdemeanor if it is so designated by law or if persons convicted thereof may be imprisoned in the county jail for a term not to exceed one year.

(5) A crime is a simple misdemeanor if it is so designated by law or if persons convicted thereof may be imprisoned in the county jail for a term not to exceed three months.

(6) A crime is a petty misdemeanor if it is so designated by law or if persons convicted thereof may be fined not in excess of $200 or, in addition to such fine, the law authorizes a forfeiture or similar penalty.

(7) Conviction of a petty misdemeanor shall not give rise to any disability or legal disadvantage imposed upon conviction of crime.

Section 6.01. Conformity with Classification and Sentence; Future Legislation.

From and after the effective date of this code all penal laws that may be enacted shall be classified for the purpose of sentence in accordance with this code.

Section 6.02. Sentence in Accordance with Code; Authorized Dispositions.

(1) No person convicted of a crime specified in this code shall be sentenced otherwise than in accordance with this article.

(a) Notwithstanding any other provision of law, a felony defined by any statute of this state other than this code which exceeds in any way the sentence authorized herein for felonies of the fourth degree shall constitute for the purpose of sentence a felony of the fourth degree. All persons convicted under such a statute shall be deemed convicted of a felony of the fourth degree and sentenced in accordance with this code.

(b) Misdemeanors defined by any statute of this state, or by any ordinance, other than this code shall be classified as gross misdemeanors, simple misdemeanors, or petty misdemeanors according to the jail term or fine that now may be imposed.

Unless expressly stated in this code no existing misdemeanor penalty shall be increased by virtue of the adoption of this code.

(2) The court may suspend the imposition of sentence on a person convicted of a crime and order that application be made for civil commitment in accordance with Section 6.13, or may sentence him as follows:

(a) to pay a fine as authorized by Section 6.03 or Section 6.04; or

(b) to be placed on probation; or

(c) to imprisonment for a term authorized by this code or by a statute of this state found outside this code; or

(d) to fine and probation or fine and imprisonment or to imprisonment in the county jail not to exceed 30 days and probation.

[(3) The court shall sentence a person who has been convicted of [murder] [murder in the first degree] to death or imprisonment in accordance with Section 210.6.]

NOTE: Subsection (3) is inserted to call it to the attention of the reporter dealing with offenses carrying the death penalty. This subsection will have to be redrafted to conform with those provisions.

(4) This article does not deprive any court or agency of any authority conferred by law to decree a forfeiture of property, suspend or cancel a license, remove a person from office, or impose any other civil penalty.

NOTE: Subsection (4) may be redrafted if it is necessary in order that it will refer to Section 1.04(7).

Section 6.04. Fines for Misdemeanors.

(1) Gross misdemeanor. A sentence to pay a fine for a gross misdemeanor shall be a sentence to pay an amount, fixed by the court, not to exceed $1,000.

(2) Simple misdemeanor. A sentence to pay a fine for a simple misdemeanor shall be a sentence to pay an amount, fixed by the court, not to exceed $500.

(3) Petty misdemeanor. A sentence to pay a fine for a petty misdemeanor shall be a sentence to pay an amount, fixed by the court, not to exceed $200.

(4) In the case of a misdemeanor defined outside of this code, if the amount of the fine is expressly specified in the law or ordinance that defines the offense, the amount of the fine shall be fixed in accordance with that law or ordinance.

(5) Alternative sentence. If a person has gained money or property through the commission of any gross misdemeanor or any simple misdemeanor then upon conviction thereof the court, in lieu of imposing the fine authorized under Subsection (1) or (2) above, may sentence the defendant to pay an amount, fixed by the court, not to exceed double the amount of the defendant's gain from the commission of the crime.

(6) The criteria found in Section 7.01 shall apply to the computation and imposition of any fine to be imposed under this section.

Section 6.08. Sentence of Imprisonment for Misdemeanors.

(1) Gross misdemeanor. A person who has been convicted of a gross misdemeanor may be sentenced to imprisonment in the county jail for a term not to exceed one year.

(2) Simple misdemeanor. A person who has been convicted of a simple misdemeanor may be sentenced to imprisonment in the county jail for a term not to exceed three months.

[Section 6.03. Fine for Felony.

(1) The court may impose a fine for any felony if the defendant has gained money or property through the commission of the crime.

(2) A sentence to pay a fine for a felony shall be a sentence to pay an amount, fixed by the court, not to exceed double the amount of the defendant's gain from the commission of the crime.

(3) The criteria found in Section 7.01 shall apply to the computation and imposition of any such fine.]

NOTE: The committee conditionally approved the felony fine section with the understanding that there would be further consideration of the issues of appellate review of sentences, time limitation on having to pay the fine, and restitution.

Section 7.01. Criteria for Imposing Fines.

(1) As used in Sections 6.03 and 6.04 the term "gain" means the amount of money or the value of property derived from the commission of the crime, less the amount of money or value of property returned to the victim of the crime or seized by or surrendered to lawful authority prior to the time sentence is imposed.

When the court imposes a fine the court shall make a finding as to the amount of the defendant's gain from the crime. If the record does not contain sufficient evidence to support such a finding the court may conduct a hearing upon the issue.

(2) In determining the amount and method of payment of a fine, the court shall consider:

(a) the ability of the defendant to pay the amount of the fine;

(b) the ability of the defendant to pay the fine by the method sought to be imposed;

(c) the hardship likely to be imposed on the defendant's dependents by the amount and method of payment of the fine; and

(d) the impact the fine will have on the defendant's ability to make restitution or reparation to the victim of the crime.

Section 6.06. Sentence of Imprisonment for Felony; Ordinary Term.

A person who has been convicted of a felony may be sentenced by the court to imprisonment as follows:

(1) In the case of a felony of the first degree, for a term the minimum of which shall be fixed at not less than 1 year nor more than 10 years, and the maximum at not more than 30 years or at life imprisonment.

(2) In the case of a felony of the second degree, for a term the minimum of which shall be fixed at not less than 1 year nor more than 5 years, and the maximum at not more than 15 years.

(3) In the case of a felony of the third degree, for a term the minimum of which shall be fixed at not less than 1 year nor more than 3 years, and the maximum at not more than 10 years.

(4) In the case of a felony of the fourth degree, for a term the minimum of which shall be fixed at not less than one year nor more than two years, and the maximum at not more than five years.

No sentence shall be imposed under this section whereby the minimum is longer than one-half the maximum, or, when the maximum is life imprisonment, longer than 10 years.

Section 6.07. Sentence of Imprisonment for Felony; Extended Term.

The court may sentence a defendant convicted of a felony, other than a felony in the first degree, to an extended term of 30 years if the court determines that the defendant is a dangerous offender. In order to so determine, the court must find that the defendant is 18 years of age or over and that his past conduct has been characterized by a pattern of repetitive or compulsive behaviour involving the threat or imposition of physical harm to others or that he is suffering from a serious personality disorder and thus is reasonably likely to inflict serious bodily harm on others in the foreseeable future and such extended term is necessary to protect the public, and it further finds, as provided in Section 7.03, that the following grounds exist:

(1) The defendant presently stands convicted of a felony in which he inflicted or attempted to inflict serious bodily harm on others; or

(2) The defendant presently stands convicted of a felony which created a substantial risk to the life or personal safety of others and has been previously convicted of one or more felonies not related to the present crime as a single episode; or

[(3) The defendant presently stands convicted of a felony involving extortion, bribery of a public official, compulsory prostitution, selling or knowingly and unlawfully transporting narcotics to facilitate their sale, or the use or attempt to use physical violence, committed as part of a continuing criminal conspiracy.

The requirement that the court determine whether or not the defendant is reasonably likely to inflict serious bodily harm on others in the foreseeable future shall not apply to this section.]

NOTE: The committee deferred the decision on inclusion of Subsection (3) until after the conspiracy section is drafted.

[Section 7.03. Procedure for Sentence of Extended Term of Imprisonment.

(1) No defendant shall be sentenced to an extended term of imprisonment under Section 6.07 unless:

(a) Within seven days of the announcement of the verdict of guilty the prosecuting attorney, at his own instance with the permission of the court or at the direction of the court, serves written notice on the defendant or his attorney that the court may sentence the defendant as a dangerous offender and setting forth the grounds therefor.

(b) A summary hearing is held, at a time fixed in said notice but not less than 15 days after its service, at which evidence for and against the imposition of an extended term of imprisonment shall be received and at which the defendant is entitled to be heard and represented by counsel.

(c) The court has available and considers the presentence report and diagnostic evaluation described in Section 7.04.

(d) The court makes findings in conformity with Section 6.07 and incorporates such findings in the record.]

NOTE: The committee tentatively adopted the provision with the understanding that it would be redrafted to provide pre-trial notice to the defendant in all cases where the prosecuting attorney knows in advance that the dangerous offender provisions may be invoked against him.

Section 7.04. Presentence Investigation and Diagnostic Reports; Extended Term of Imprisonment.

(1) No defendant shall be sentenced to an extended term of imprisonment under Section 6.07 unless a written report by a probation officer is presented to and considered by the court.

Any such report shall be open to inspection by the prosecuting attorney and the defendant's attorney prior to sentence and on request of either of them a summary hearing in chambers shall be held on any matter brought in issue, but confidential sources of information shall not be disclosed unless the court otherwise directs.

(2) No defendant shall be sentenced to an extended term of imprisonment under Section 6.07 unless at least two physicians, one of whom shall be a psychiatrist, licensed to practice medicine in this state or employed by an agency of the state or the federal government, submit a report to the court, based on complete and thorough examinations, describing in detail the nature and extent of any psychiatric disorder that may exist, the type of treatment prescribed, the availability of such treatment, an opinion concerning whether or not the defendant is likely to inflict serious bodily harm on others in the foreseeable future and the circumstances under which this might occur, and any other matters deemed relevant by the court or the examining physicians.

For the purpose of obtaining such examination the court may remand the defendant for a period not to exceed 90 days to the custody of the superintendent of the nearest facility operated by the Texas Department of Mental Health and Mental Retardation which has appropriate resources to conduct such examination and prepare such report.

MINUTES

OF THE TEXAS STATE BAR COMMITTEE

ON REVISION OF THE PENAL CODE

FRIDAY, JUNE 16, 1967

Present: Committee Members Page Keeton, Chairman; Judge John M. Barron; Judge Lloyd Davidson; Judge Ed B. Duggan; George W. Gray; Newton Gresham; Judge George Kelton; Judge T. Gilbert Sharpe.

Law Enforcement Advisory Committee G. C. Conner.

Advisory Committee on Corrections Dr. George Killinger; James F. Berger.

Reporters Fred Cohen; Frank Maloney; Albert Alschuler; Judge Archie Brown; Judge Semaan.

Staff Bill Reid.

The Texas State Bar Committee on Revision of the Penal Code met on June 16, 1967, at The University of Texas School of Law in Austin, Texas, in the Alumni Lounge at 10 a.m.

The committee considered Dean Keeton's proposed draft on the rape provisions, which he drafted in order to reflect the committee's recommendations for changes made at the last meeting on April 28-29.

Dean Keeton presented the following draft:

(NOTE: In order to reflect the action taken by the committee on the drafts, the minutes will present additions by the committee underlined and deletions in parentheses in capitals.)

Section 101. Rape.

1. A male who has sexual intercourse (OR DEVIATE SEXUAL INTERCOURSE) with a female not his wife, without that person's consent, commits rape. The intercourse is without the female's consent under any of the following circumstances:

(a) he compels her to submit or participate by force that overcomes such earnest resistance as might be reasonably expected under the circumstances, or

(b) he compels her to submit or participate by any threat that would prevent resistance by a woman of ordinary resolution, or

(c) she has not given express or implied consent and he knows she is unconscious or physically unable to resist, or

(d) he knows that as a result of mental disease or defect she is at the time of the sexual intercourse (PRESENTLY) incapable of appraising the nature of her conduct, or

(e) he knows she is unaware that a sexual act is being committed, or

(f) he knows that she submits or participates because she erroneously believes that he is her husband, or

(g) he has (SUBSTANTIALLY) impaired her power to appraise or control her conduct by administering without her knowledge drugs, alcohol, or similar substance with intent (FOR THE PURPOSE) of preventing resistance.

(h) (SHE IS IN LEGAL CUSTODY OR INVOLUNTARILY DETAINED IN A HOSPITAL OR OTHER INSTITUTION AND THE ACTOR HAS SUPERVISORY OR DISCIPLINARY AUTHORITY OVER HER.)

2. Rape is a felony of the second degree (EXCEPT WHERE COMMITTED UNDER CIRCUMSTANCES SET FORTH IN (h), IN WHICH EVENT IT IS A FELONY OF THE THIRD DEGREE).

Section 102. Aggravated Rape.

1. A male who has sexual intercourse (OR DEVIATE SEXUAL INTERCOURSE) with a female not his wife, without that person's consent as defined in Section 101, commits aggravated rape if:

(a) he (INTENTIONALLY, KNOWINGLY OR RECKLESSLY INFLICTED) causes serious bodily injury to anyone in the course thereof; or

(b) he compels submission by express or implied threat of death, serious bodily injury, extreme pain, or kidnapping to be imminently inflicted on anyone.

2. Aggravated rape is a felony of the first degree.

Dean Keeton explained that he had combined the two sections of Mr. Finer's draft dealing with rape and gross sexual imposition. He stated that, in view of the felony categories and the discretion given the judge, he thought it would be a much simpler statute, and much easier for the prosecution to use in drawing indictments if there is only an offense called rape with a combination of the features of Mr. Finer's draft.

Dean Keeton noted in Subdivision (b) of Section 101 that he had made no distinction between threats of bodily injury and other threats, explaining that the judge can take the seriousness of the threat into account in sentencing.

Mr. Malony suggested that Subdivision (d) be amended by inserting "at the time of the sexual intercourse" in place of the word "presently". The committee approved the amendment.

In the discussion of Subdivision (g) the opinion was offered that "substantially" should not modify "impaired". Another suggestion was made that there be such impairment that it renders her incapable of appraising or controlling her conduct. The committee voted on these alternatives and decided to delete the word "substantially".

Judge Davidson asked to go on record as being opposed to any change in the present statute.

Dean Keeton noted that Subdivision (h) was made a lesser offense since it involves the least misconduct. There is no threat, no force, no fraud, no unconsciousness, but only a coercive situation. Some of the committee members stated that they had grave doubts about the subdivision being included at all. Mr. Gresham stated that he believed the danger of collusive and unjustified prosecution in these circumstances outweighs the consideration of preventing people from taking advantage of their positions in stitutions. Mr. Conner stated that generally he thought it was a good provision because there would be serious evidentiary problems for the woman involved and that people in supervisory or disciplinary positions should have some penal sanction applied to them when they take advantage of their situation. Judge Sharpe noted that the provision essentially served notice to people in positions of authority in institutions that they cannot have any relations with the inmates.

Dean Keeton asked the committee how many wanted to delete Subdivision (h). The committee voted to delete the provision and to delete the reference to Subdivision (h) from the penalty section.

Dean Keeton presented his draft on aggravated rape. There was discussion as to whether the state should be required to prove that the actor "intentionally, knowingly or recklessly inflicted serious bodily injury". The committee decided that a person who commits rape should assume liability for the infliction of injury without the state having to prove that he intended to inflict the injury.

The committee was also concerned with the situation where the victim does not suffer serious bodily injury, but serious mental or emotional problems result from the rape. The committee did not want to redefine "serious bodily injury" in the general definitions section to include mental injury, but adopted Dean Keeton's draft on aggravated rape with the understanding that a redraft of Section 102(1)(a) including some mention of mental injury would be submitted for consideration at a later meeting.

As a result of some discussion as to how the prosecutor was to decide whether to charge rape or aggravated rape, Dean Keeton said that the general section of the code would clearly state that a charge of the more serious offense would include the lesser offenses.

Several committee members were concerned about the rape of children. Dean Keeton explained that these drafts do not cover sex offenses against children and that provisions for children are being drafted. However, Dean Keeton said that when the committee considers the drafts dealing with children they should determine whether or not having intercourse with any small child should be aggravated rape.

Dean Keeton then raised the issue of deviate sexual intercourse. He said that the rape section could be drafted to cover all sexual assaults by force, as "a person who has sexual intercourse or deviate sexual intercourse with another person without that person's consent commits rape". The major objection to this approach was that it would be difficult to sell the legislature and the public a definition of rape which includes assault by one woman on another woman or by a man on another man. The general feeling of the committee was that to maintain the traditional approach to rape there should be a separate section dealing with deviate sexual intercourse. The committee agreed to eliminate the references to deviate sexual intercourse from the rape provisions and to have a separate draft on deviate sexual intercourse framed to parallel the rape provisions, but include male, female, and any combination.

The committee approved Dean Keeton's draft as amended and recessed at 12:05 p.m. for lunch.

The meeting resumed at 1:00 p.m. The topic of discussion was Fred Cohen's report on sentencing.

Mr. Cohen presented the following drafts:

(NOTE: Drafts not considered by the committee are omitted.)

Section 1.04. Classes of Crimes.

(1) Crimes are classified as felonies, gross misdemeanors, simple misdemeanors, or petty misdemeanors.

(2) A crime is a felony if it is so designated by law or if persons convicted thereof may be sentenced to death or to the custody of the Texas Department of Corrections.

(3) Felonies are classified according to the relative seriousness of the crime, for the purpose of sentence, into four degrees, as follows:

(a) felonies of the first degree;

(b) felonies of the second degree;

(c) felonies of the third degree; and

(d) felonies of the fourth degree.

A crime declared to be a felony without specification of degree is of the fourth degree.

(4) A crime is a gross misdemeanor if it is so designated by law or if persons convicted thereof may be imprisoned in the county jail for a term not to exceed one year.

(5) A crime is a simple misdemeanor if it is so designated by law or if persons convicted thereof may be imprisoned in the county jail for a term not to exceed three months.

(6) A crime is a petty misdemeanor if it is so designated by law or if persons convicted thereof may be fined not in excess of $200 or, in addition to such fine, the law authorizes a forfeiture or similar penalty.

(7) Conviction of a petty misdemeanor shall not give rise to any disability or legal disadvantage imposed by law upon conviction of a crime.

Mr. Cohen noted that the classes of crime section is basic and that the point of the section is to set up sufficient

categories to allow a reasonable reflection of seriousness and to relate the classification of crimes to the sentencing provisions. He explained that historically when over 200 felonies were subject to capital punishment there was little or no discrimination in sentencing. The practice has changed and there are now more alternatives available to the judge. With more discrimination in sentencing, more categories are needed to allow various levels of discretion. The proposed classifications will alter the traditional Texas legislative practice of attaching a specific penalty to each crime. The structure will avoid the lack of consistency in our present penalty system by allowing the legislature to decide in what general category an offense belongs, instead of merely deciding on 39 years or 26 years or any number of years that they pick out of the air.

Judge Barron asked why there were four categories of felonies rather than three as in the Model Penal Code (M.P.C.). Mr. Cohen replied that he thought four degrees were necessary to create the number of choices that will be needed when the various offenses are classified. He said that the committee might find that three degrees were sufficient and then the fourth could be eliminated. He pointed out that the number of degrees also relates to the allocation of authority between the legislature and the judge. Essentially, the legislature retains more control, and the judge is given less authority, by breaking the classes into four degrees.

Mr. Cohen explained his substitution of the petty misdemeanor category for the M.P.C. violation category was necessary because of Texas constitutional jurisdictional restrictions. The provision restates the jurisdiction of the justice courts and at the same time avoids questions of jury requirements, counsel requirements, etc., which would arise with a "civil" violation category, as proposed in the M.P.C.

Mr. Conner asked if Subsection (7) would impair any administrative action. Mr. Cohen said that it was not intended to, but that language might be needed to clarify this because many administrative actions depend on court action.

Mr. Cohen presented Article 6, Section 6.01, of his draft.

Section 6.01. Conformity with Classification and Sentence; Future Legislation.

From and after the effective date of this code all penal

laws (CRIMES) that may be enacted shall be classified for the purpose of sentence in accordance with this code.

Mr. Cohen pointed out that obviously the provision is purely hortatory, but it is intended as a strong expression on the part of the legislature that adopts the code that the code's basic scheme should be followed in the future.

Judge Barron noted that crimes are not enacted and that the wording should be changed. Various suggestions were made for change, and Mr. Cohen suggested "all penal laws that may be enacted". The committee agreed that this was satisfactory and could be changed by later drafting to make it clear that any law that the legislature passes which carries a penal sanction shall be in conformity with the sentencing structure of the penal code.

Mr. Cohen presented his Section 6.02.

Section 6.02. Sentence in Accordance with Code; Authorized Dispositions.

(1) No person convicted of a crime specified in this code shall be sentenced otherwise than in accordance with this article.

(a) Notwithstanding any other provision of law, a felony defined by any statute of this state other than this code which exceeds in any way the sentence authorized herein for felonies of the fourth degree shall constitute for the purpose of sentence a felony of the fourth degree. All persons convicted under such a statute shall be deemed convicted of a felony of the fourth degree and sentenced in accordance with this code.

(b) Misdemeanors defined by any statute of this state, or by any ordinance, other than this code shall be classified as gross misdemeanors, simple misdemeanors, or petty misdemeanors according to the jail term or fine that now may be imposed.

Unless expressly stated in this code no existing misdemeanor penalty shall be increased by virtue of the adoption of this code.

(2) The court may suspend the imposition of sentence on a person convicted of a crime and order that application be made for civil commitment in accordance with Section 6.13, or may sentence him as follows:

(a) to pay a fine as authorized by Section 6.03 or Section 6.04; or

(b) to be placed on probation; or

(c) to imprisonment for a term authorized by this code (ARTICLE) or by a statute of this state found outside this code; or

(d) to fine and probation or fine and imprisonment or to imprisonment in the county jail not to exceed 30 days and probation.

[(3) The court shall sentence a person who has been convicted of [murder] [murder in the first degree] to death or imprisonment in accordance with Section 210.6.]

NOTE: Subsection (3) is inserted to call it to the attention of the reporter dealing with offenses carrying the death penalty. This subsection will have to be redrafted to conform with those provisions.

(4) This article does not deprive any (THE) court or agency of any authority conferred by law to decree a forfiture of property, suspend or cancel a license, remove a person from office, or impose any other civil penalty. (SUCH A JUDGMENT OR ORDER MAY BE INCLUDED IN THE SENTENCE.)

NOTE: Subsection (4) may be redrafted if it is necessary in order that it will refer to Section 1.04(7).

Mr. Cohen explained the rationale for Section 6.02(1)(a). He said that it seemed to him a step in the direction of consistency and rationality in the penal law to make an offense serious enough to be defined a felony but for reasons of history or accident located outside the penal code not exceed in seriousness the least serious felony which the penal code adopts. In other words, if the crime is serious enough it ought to be brought into the code, or at least the legislature should consider whether or not they want to leave such high penalties outside the penal code.

Mr. Cohen explained that 6.02(1)(b) does not change the law, but is simply a clarification device to assist the courts in determining the intent of the legislature in passing the code.

Judge Brown noted that 6.02(2)(d) will give the court the authority to do something they cannot do now: sentence a person to jail time and to probation. He thought it was a good provision because a judge might use some jail time to impress a person with the seriousness of the offense and then probate the rest of the sentence.

Mr. Cohen explained that 6.02(3) should be placed in brackets with a note to the reporter for the offenses against the person to make sure this section is complete when he is dealing with his own provisions in the homicide section. Mr. Gresham noted that Subsection (3) would prohibit giving a person probation if he had been convicted of murder. Mr. Cohen agreed and said that was the M.P.C. approach and he included it for completeness and as a note for the reporter dealing with this topic.

Mr. Cohen said that Subsection (4) was included to make it clear that the courts still have all the powers they had before. Judge Sharpe recommended deletion of the last sentence. Dean Keeton said he didn't see any need for the last sentence. Dean Keeton proposed that the provision be amended to make sure that it does not refer only to the sentencing court but to any court by making it read, "This article does not deprive any court or agency of any authority conferred by law to decree a forfiture, etc.", and then delete the last sentence. The committee concurred in the amendment.

The committee went on to consider the misdemeanor penalties.*

Section 6.04. Fines for Misdemeanors.

(1) Gross misdemeanor. A sentence to pay a fine for a gross misdemeanor shall be a sentence to pay an amount, fixed by the court, not to exceed $1,000.

(2) Simple misdemeanor. A sentence to pay a fine for a simple misdemeanor shall be a sentence to pay an amount, fixed by the court, not to exceed $500.

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*See chart on page 20.

(3) Petty misdemeanor. A sentence to pay a fine for a petty misdemeanor shall be a sentence to pay an amount, fixed by the court, not to exceed $200.

(4) In the case of a misdemeanor defined outside of this code, if the amount of the fine is expressly specified in the law or ordinance that defines the offense, the amount of the fine shall be fixed in accordance with that law or ordinance.

(5) Alternative sentence. If a person has gained money or property through the commission of any gross misdemeanor or any simple misdemeanor then upon conviction thereof the court, in lieu of imposing the fine authorized under Subsection (1) or (2) above, may sentence the defendant to pay an amount, fixed by the court, not to exceed double the amount of the defendant's gain from the commission of the crime.

(6) The criteria found in Section 7.01 shall apply to the computation and imposition of any fine to be imposed under this section.

Mr. Cohen explained that the maximum fine for petty misdemeanors is the constitutional limit for the justice of the peace courts, but that the maximums for simple and gross misdemeanors are arbitrary figures, although scaled to reflect the seriousness of the categories. He said that Subsection (4) was included to avoid wholesale confusion when the code goes into effect and to make it clear that there is no intent to change laws not included in the penal code which have a misdemeanor penalty attached.

Mr. Cohen explained that Subsection (5) follows the principle of the felony fine provision and applies to misdemeanor cases involving loss of property.

Mr. Cohen presented Section 6.08.

Section 6.08. Sentence of Imprisonment for Misdemeanors.

(1) Gross Misdemeanor. A person who has been convicted of a gross misdemeanor may be sentenced to imprisonment in the county jail for a term not to exceed one year.

(2) Simple Misdemeanor. A person who has been convicted of a simple misdemeanor may be sentenced to imprisonment in the county jail for a term not to exceed three months.

The committee approved these sections as read.

MISDEMEANORS

CLASS	JAIL			FINE			ALTERNATIVE FINE
	Min.		Max.	Min.		Max.	
Gross	0	--	1 year	$0	--	$1,000	Not to exceed
Simple	0	--	3 months	$0	--	$ 500	double amount
Petty	None			$0	--	$ 200	gained

Mr. Cohen presented Section 6.03.

[Section 6.03. Fine for Felony.

(1) The court may impose a fine for any felony if the defendant has gained money or property through the commission of the crime.

(2) A sentence to pay a fine for a felony shall be a sentence to pay an amount, fixed by the court, not to exceed double the amount of the defendant's gain from the commission of the crime.

(3) The criteria found in Section 7.01 shall apply to the computation and imposition of any such fine.]

Mr. Cohen noted that the felony fine section was adapted from the New York approach, which in turn modified the M.P.C. provisions. He explained the section assumes fines have a deterrent effect for some offenses related to pecuniary gain.

Judge Brown raised the issue of the defendant who cannot pay. He asked if the person will be required to lay out the fine at $5 per day, or to serve his full time without parole. Mr. Cohen said that there has to be a maximum time which a person can be required to lay out a fine. Judge Brown said it could be set up like the federal system where a large fine can be assessed subject to execution only. The committee noted that the fine was in addition to a penitentiary sentence, and one committee member stated that the fine and laying out the fine should apply only to the fine and should not relate to the penitientiary sentence. Dean Keeton said he agreed with that position.

Mr. Gresham felt that two restrictions were necessary to avoid abuse of the fining power: (1) a limit on the term of imprisonment served for failure to pay the fine, and (2) appellate review of sentencing including the amount of the fine. Judge Brown said that the committee should seriously consider giving the court of criminal appeals the authority to remit rather than reverse to save retrial of the case.

The committee generally agreed that some time limitation should be included. Dean Keeton said he felt very strongly

that, if the felony fine is included, there should at least be appellate review of the fine if not of general sentencing.

Mr. Gray proposed including a provision requiring restitution before the state gets any amount of fine. One committee member recommended an insertion such as, "The court may require the fine to be paid to the injured party." Mr. Maloney stated that he understood Section 6.02 to mean that there can be no restitution without probation, and pointed out that a fine in addition to imprisonment would not help the victim.

From the committee's discussion, Mr. Cohen said he would like to make a note in Section 6.02 to make the fine remittable at any time if the defendant prefers to make restitution rather than pay the fine.

The committee left the section on felony fine with the understanding that there would be further consideration of the issues of appellate review, time limitations on having to pay the fine, and restitution.

Mr. Conner raised another issue involving felony fines. He pointed out that the provision could eliminate the fine provided for felony DWI since no gain to the defendant is involved in those cases. Dean Keeton said that the DWI statutes were not assigned to the penal code, but to the traffic code. He said that the legislative council would be informed of the problem.

The committee decided to proceed immediately to Section 7.01 which deals with the criteria for imposing fines.

Section 7.01. Criteria for Imposing Fines.

(1) As used in Sections 6.03 and 6.04 the term "gain" means the amount of money or the value of property derived from the commission of the crime, less the amount of money or value of property returned to the victim of the crime or seized by or surrendered to lawful authority prior to the time sentence is imposed.

When the court imposes a fine the court shall make a finding as to the amount of the defendant's gain from the crime. If the record does not contain sufficient evidence to support such a finding the court may conduct a hearing upon the issue.

(2) In determining the amount and method of payment of a fine, the court shall consider:

(a) the ability of the defendant to pay the amount of the fine;

(b) the ability of the defendant to pay the fine by the method sought to be imposed;

(c) the hardship likely to be imposed on the defendant's dependents by the amount and method of payment of the fine; and

(d) the impact the fine will have on the defendant's ability to make restitution or reparation to the victim of the crime.

One of the committee members raised the issue of what is meant by defendant's gain. The committee member posed the hypothetical example of a person stealing a $1,000 diamond and selling it for $200. Mr. Cohen explained that we have the same problem now of determining value, for example, in a theft case. The courts use current market value.

Mr. Cohen noted that the judge is required to take into account the possibility of restitution, and that Subsection (1) is designed to discourage a defendant from sitting out a fine by defining his gain in terms of the amount received less the amount returned. He said that the impetus to restitution is clearly contemplated by the draft, but that it can be spelled out even more clearly if the committee believes it necessary.

Mr. Gresham said that all the things set out in Section 7.01 seemed to him to be reviewable by the court of criminal appeals as matters of fact.

Mr. Cohen presented his draft of Section 6.06.*

Section 6.06. Sentence of Imprisonment for Felony; Ordinary Terms.

A person who has been convicted of a felony may be sentenced by the court to imprisonment as follows:

(1) In the case of a felony of the first degree, for a term the minimum of which shall be fixed at not less than

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*See Chart on page 28.

1 year nor more than 10 years, and the maximum at not more than 30 (TWENTY) years or at life imprisonment.

(2) In the case of a felony of the second degree, for a term the minimum of which shall be fixed at not less than 1 year nor more than 5 years, and the maximum at not more than 15 years.

(3) In the case of a felony of the third degree, for a term the minimum of which shall be fixed at not less than 1 year nor more than 3 years, and the maximum at not more than 10 years.

(4) In the case of a felony of the fourth degree, for a term the minimum of which shall be fixed at not less than one year nor more than two years, and the maximum at not more than five years.

No sentence shall be imposed under this section whereby the minimum is longer than one-half the maximum, or, when the maximum is life imprisonment, longer than 10 years.

Dean Keeton read a letter from Judge Roberts in which he discussed the penalty for a first degree felony. Judge Roberts stated that the minimum seemed reasonable, but that the maximum of 20 years and a jump to life seemed unreasonable. He felt that there should be a higher maximum so that the judge does not have a choice just between 20 years or life.

Judge Duggan expressed the opinion that an extremely large number of life sentences would result under this provision because judges would often choose life because they did not think that 20 years was enough. He suggested raising the maximum to 30 years or life imprisonment. The committee voted to make this change.

Judge Kelton questioned the need for a minimum sentence since under our present correctional system it would be meaningless.

Mr. Cohen explained that the purpose of the minimum sentence is to provide a parole eligibility date. He said that the structure is meaningless only if parole eligibility continues to be based on the maximum term. The sliding minimum sentence allows the judge discretion to reflect the moral decision and the sense of the community as to the seriousness of the crime. Then, after the defendant has served the minimum time set by the judge, the parole board's discretion

begins to function. The maximum is really a control on the penal institutions. The question is: What can the judge at the time of sentencing sensibly reflect based on the information he has available? The M.P.C.'s answer is that the judge can reflect the community morals, but he is limited in his ability to predict the course of the defendant's rehabilitation. Mr. Cohen explained that the notion of a "not-less-than-one" sentence throughout the draft is based on penological experience that it takes at least one year for an institution to find out anything about the man in order to classify him.

Dean Keeton asked if the good-time laws would apply to the minimum. Mr. Cohen said that the committee would have to decide, but that for incentive purposes he felt that there ought to be a greatly reduced good-time provision operating on the minimum for parole eligibility and on the maximum for purposes of discharge.

Judge Kelton asked, under this system, when a man sentenced to a two-year minimum and an eight-year maximum would be eligible for parole. Mr. Cohen said, taking the federal good-time law of 6 days per month as an example, the man would be eligible for parole in 2 years less 144 days. If the parole board did not grant him probation, he would stay in eight years less the six days a month of good time he earned.

Dr. Killinger said that what is really needed is a reasonable good-time law which allows for 6, 7, or 8 days to be earned per month instead of the present Texas law which allows up to 50 days a month to be earned. He pointed out that only a small number of prisoners are paroled in Texas, but many get out on complete discharges because of the liberal good-time laws.

Dr. Killinger compared the Texas system with the federal system. He said if a judge in the District of Columbia sentences a man to two to nine years, the man must serve the two years and nothing can subtract from those two calendar years. The man is not eligible for parole until after he serves the minimum. Thereafter, it is up to the treatment facilities to determine when the man is eligible for conditional release. At the federal level good time ranges from 6 days a month to 10 days a month for life sentences, but does not apply until the person is eligible for parole. Eligibility for parole is considered enough incentive up until that time.

Dr. Killinger explained that in Texas good time is given as an incentive for good behaviour in prison because the prisoners do not get pay or anything else to make them conform. He pointed out that parole eligibility was based on one-third or one-fourth of the maximum less good time and that discharge was based on the maximum less good time.

Mr. Alschuler pointed out that the one-third or one-fourth of the maximum sentence would be eliminated by the proposed section. He noted that the M.P.C. proposes six days per month reduction in sentence for good time, and that this is applied to the minimum to determine the eligibility for parole, and to the maximum to determine the date of discharge.

Mr. Cohen said the significance of the good-time law in Texas is the way it operates on the maximum sentence to provide a discharge date at which time the man must be discharged regardless of his readiness to be thrust upon society. He said our problem is that we are discharging people without supervision, whereas, in order to protect the community, we should let them out on parole and under supervision to make sure that they are really rehabilitated. Mr. Gresham added that the fundamental problem is that too many people are being sent to prison, and that we are not being selective enough about those who are retained in prison.

Dean Keeton said that to make the proposed system operate there will have to be a change in the good-time law so that there will be a meaningful minimum sentence. Judge Brown stated that the people of this state are critical of the whole criminal process because our minimum sentences are now meaningless. He added that by this system we would be defining a minimum sentence to mean something and to be a useful part of the system.

Dean Keeton asked Dr. Killinger how he would advise handling parole eligibility under the proposed system where a man was sentenced to a minimum of 4 and a maximum of 10 years. Dr. Killinger replied that he believed that the man should not be eligible for parole for four calendar years, but that he would keep the minimums down. Dr. Killinger noted that the Texas Department of Corrections will be in serious trouble if the parole boards do not parole more than 40 percent of the people as they are doing now. For comparison he noted that in Washington people are paroled at the rate of 90 percent.

Mr. Cohen stated that he felt that Dr. Beto's objection would be that judges will sentence people to the highest minimum possible and that the department does not have the

facilities to keep them all in prison. Dean Keeton stated that the judges should not give high minimums except in extraordinary cases. He said he liked the proposed system and he was not concerned at this point that the judges will impose extremely long minimum sentences. He pointed out that institutes on sentencing could be held for judges, and that some good-time benefits were going to be provided on the minimum. Dean Keeton asked Dr. Killinger to send the committee any information he has on cutting down the good-time provisions.

Judge Brown noted that one thing had not been clearly stated, and that is that the whole proposal for a sentencing structure is predicated on the hope that we will have judge-sentencing based on an impartial presentence investigation.

Dean Keeton asked Mr. Berger if he would like to comment on the question in general. Mr. Berger said in Texas, when the judge sentences he has no information on the person except what the district attorney brings in on a "rap sheet", and what the defense attorney says. The judge gets two extremes without any impartial factual investigation on the individual. Then, if the man is sentenced to prison, the prison authorities get a commitment order and a very brief statement of facts concerning his offense. The institution tries to build a history by interviewing the man. When he reaches parole eligibility, the parole board tries to have a one-shot interview at the diagnostic center by the parole officer. So many times all the parole board has to aid its decision is the statement of facts, the prison data sheet on sentencing, and one interview by the parole officer.

Mr. Cohen said he would prefer a system like the federal practice where the judge can commit the person to a diagnostic facility for 60 to 90 days; then the man comes back with a full report on him and the judge sentences him. Dean Keeton said the legislature is not going to spend the money necessary to provide such a system.

Dean Keeton asked if the committee was ready to adopt the felony sentencing provision. The committee approved the drafts as amended.

The discussion proceeded to Section 6.07.

FELONY, ORDINARY TERMS

FELONY DEGREE	MINIMUM			MAXIMUM	FINE
	not less than		not more than	not more than	
First	1	--	10	30, or life	Not more
Second	1	--	5	15	than double
Third	1	--	3	10	amount gained
Fourth	1	--	2	5	

NO MINIMUM MAY EXCEED ONE-HALF OF MAXIMUM.

IF MAXIMUM IS LIFE, MINIMUM MAY NOT EXCEED 10 YEARS.

Section 6.07. Sentence of Imprisonment for Felony; Extended Term.

The court may sentence a defendant convicted of a felony, other than a felony in the first degree, to an extended term of 30 years if the court determines that the defendant is a dangerous offender. In order to so determine, the court must find that the defendant is 18 years of age or over and that his past conduct has been characterized by a pattern of repetitive or complusive behaviour involving the threat or imposition of physical harm to others or that he is suffering from a serious personality disorder and thus is reasonably likely to inflict serious bodily harm on others in the foreseeable future and such extended term is necessary to protect the public, and it further finds, as provided in Section 7.03, that the following grounds exist:

(1) The defendant presently stands convicted of a felony in which he inflicted or attempted to inflict serious bodily harm on others; or

(2) The defendant presently stands convicted of a felony which created a substantial risk to the life or personal safety of others and has been previously convicted of one or more felonies not related to the present crime as a single episode; or

[(3) The defendant presently stands convicted of a felony involving extortion, bribery of a public official, compulsory prostitution, selling or knowingly and unlawfully transporting narcotics to facilitate their sale, or the use or attempt to use physical violence, committed as part of a continuing criminal conspiracy.

The requirement that the court determine whether or not the defendant is reasonably likely to inflict serious bodily harm on others in the foreseeable future shall not apply to this section.]

NOTE: Decision on inclusion of Subsection (3) is deferred until after the conspiracy section is drafted.

Mr. Cohen explained that the purpose of this section is to provide an extended term for dangerous offenders. He also

noted that the section will completely replace our present enhancement laws. He explained Subsection (3) is intended to isolate the person involved in organized crime, but that at the reporters' meeting it was decided to defer decision on this until the conspiracy provisions are drafted. Dean Keeton said that instead of discussing the problem now, the committee should consider it when the conspiracy provisions are taken up.

Judge Brown said that the real problem in recidivism is the thief and that the provision as drafted does not cover him. Mr. Cohen said that while we know from studies that the standard recidivist is the alcoholic check writer and the minor sex offender (exhibitionist), the question here is whether this person should be thrown in jail for 30 years. Dean Keeton stated that some of these people should be committed for hospital treatment or dealt with in some way other than an extended prison term.

Mr. Cohen presented drafts on the sections dealing with the procedures involved in extended-term sentences.

[Section 7.03. Procedure for Sentence of Extended Term of Imprisonment.

(1) No defendant shall be sentenced to an extended term of imprisonment under Section 6.07 unless:

(a) Within seven days (FORTY-EIGHT HOURS) of the announcement of the verdict of guilty the prosecuting attorney, at his own instance with the permission of the court or at the direction of the court, serves written notice on the defendant or his attorney that the court may sentence the defendant as a dangerous offender and setting forth the grounds therefor.

(b) A summary hearing is held, at a time fixed in said notice but not less than 15 (FIVE) days after its service, at which evidence for and against the imposition of an extended term of imprisonment shall be received and at which the defendant is entitled to be heard and represented by counsel.

(c) The court has available and considers the presentence report and diagnostic evaluation described in Section 7.04.